UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re: PAUL MCCARTHY, Debtor(s).	No. 99-07063-W13 MEMORANDUM DECISION RE: BANK OF AMERICA'S MOTION FOR RELIEF FROM STAY

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on March 7, 2000 upon creditor Bank of America's Motion for Relief from Stay. Debtors were represented by Greg Heline and creditor Bank of America was represented by Laurin Schweet. The court reviewed the files and records herein, heard argument of counsel and was fully advised in the premises.

On November 17, 1999 Bank of America repossessed the 1993 Chevrolet Blazer in which it had a security interest. The debtor was, at the time, some months past due in his monthly contract payment of $403.97. On November 29, 1999, the debtor commenced a Chapter 13 proceeding and in a modified plan proposed to pay Bank of America the alleged fair market value of the vehicle over the life of the plan. Bank of America requested relief from the automatic stay and filed an objection to confirmation of the plan.

At a hearing on January 18, 2000, the court required Bank of America to return possession of the vehicle to debtor and required the debtor to make pre-confirmation adequate protection payments and set a briefing schedule on the underlying legal issue addressed by this Memorandum Decision.

The issue is whether the property of the estate is the vehicle itself or merely the debtor's right to redeem the vehicle which, under state law, necessitates a lump sum payment rather than installments during a Chapter 13 plan.

Property of the estate is defined in 11 U.S.C. § 541(a)(1) as " . . . all legal or equitable interests of the debtor in property as of the commencement of the case." The interest of the debtor in a particular piece of property is determined by reference to state law. *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979). In the case of an automobile, the debtor's interest has many different facets or components. The debtor is listed on the Certificate of Title as a registered owner. The debtor has possession. The debtor has an insurable interest in the vehicle. The debtor has the right to exercise control over the vehicle such as having it repainted or stored. The repossession by Bank of America in this case only deprived the debtor of possession, but did not deprive the debtor of all components of his legal interest. The repossession was only the first step in a multi-step process which, if completed, would have deprived the debtor of all of his interest in the vehicle.

Pursuant to R.C.W. 62A.9-503, a secured party has the right to take possession of personal property collateral after default and 62A.9-504 allows a secured party to dispose of the collateral. By

its very language, 62A.9-504(4) provides that only when collateral is sold to a bona fide purchaser is the debtor deprived of all interest in the repossessed property.

> When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings."

R.C.W. 62A.9-504(4).

Prior to the sale to a bona fide purchaser, several steps are required. In the case of consumer goods such as this vehicle, the secured creditor must first determine if the purchaser has paid 60% of the cash price of the collateral in order to determine which steps are next available to the creditor. R.C.W. 62A.9-505. The creditor may elect to accept the collateral in full satisfaction of the obligation but even so that election does not finally deprive the debtor of all rights. Under R.C.W. 62A.9-505(b) only after the creditor has sent notice of such election and the debtor fails to object for 21 days may the creditor then retain the collateral and extinguish the rights of the debtor.

If the creditor elects to sell the collateral, the creditor must provide "reasonable notification" of the sale to the debtor. The official comments to the Uniform Commercial Code state that the requirement for reasonable notice is to allow debtors ". . . sufficient time to take appropriate steps to protect their interest by taking part in the sale or other disposition if they so desire." Though the language does not directly address the question of when debtors lose all interest in the vehicle, it is consistent with

R.C.W. 62A.9-504(4) as it implies that the debtor retains some rights until the time of the sale.

The court concludes that the debtor retains both a legal and equitable interest in the vehicle after repossession. This is true by application of Washington's adoption of the Uniform Commercial Code. Bank of America references the Eleventh Circuit decision of *Charles R. Hall Motors v. Lewis (In re Lewis)*, 137 F.3d 1280 (11th Cir. Ala. 1998). That decision held that after repossession, the vehicle itself was not property of the estate but only the right of redemption. That case is not controlling precedent for this court. Also, that case is not persuasive as it was decided based on the substantive law of Alabama regarding the tort of conversion. It is not clear why the Eleventh Circuit believed that the applicable legal standard was the law of conversion, but the analysis is certainly not relevant to this case.

R.C.W. 62A.9-506 allows a debtor to redeem the collateral at any time prior to the sale or disposition. Bank of America argues that only this right to redeem is property of the estate as the debtor lost all interest in the vehicle itself at the time of repossession. The state statutes do not so provide. Rather, they provide that the debtor retains some interest in the vehicle until the actual disposition or sale.

Undaunted, Bank of America argues that the general proposition is that the commencement of a bankruptcy proceeding creates no new rights for the debtor. *In re Braker*, 125 B.R. 798 (Bank. 9th Cir. Or. 1991). Since at the time of the filing the debtor's only right was to redeem the vehicle by a lump sum payment, Bank of America argues that the commencement of the bankruptcy cannot create any

new right to redeem by making installment payments. In other words, once a vehicle is repossessed, 11 U.S.C. § 1322(b)(3) which allows the curing of a default in a Chapter 13 is inapplicable as the only right to cure that arises under state law is by way of lump sum payment.

There is no evidence in this case that any of the steps required by R.C.W. 62A.9 were taken other than repossession. There is no evidence that the debtor was provided with a notice of sale or disposition of the property or a notice of the right to redeem.

Most importantly, creditor's reliance on *Braker, supra,* is misplaced. That case concerned a foreclosure and sale of real estate under Oregon law, under which a post-sale statutory period of redemption exists. The *Braker* decision held that as the foreclosure sale extinguished the contractual relationship, the real estate mortgage was thereby extinguished. Consequently, there was no installment payment contract in effect which could be cured under 11 U.S.C. § 1322(b)(5). The post-foreclosure sale redemption rights under Oregon real property law do not reinstate the mortgage but only provide a method to satisfy the obligation in a lump sum.

The later Bankruptcy Appellate Panel decision *State, Acting By and Through Director of the Dept. of Veteran's Affairs v. Hurt (In re Hurt)*, 158 B.R. 154 (Bankr. 9th Cir. Or. 1993) analyzed not only *Braker*, but the then existing law in all circuits concerning a debtor's right to cure under 11 U.S.C. § 1322(b)(5) during a statutory redemption period on real estate. At page 158 of the opinion, the court summarized the case law as follows:

> There are four potential cutoff points for `cure' under 11 U.S.C. § 1322(b)(5): (1) at the time of the contractual acceleration; (2) upon entry of foreclosure

> judgment; (3) at the time of the foreclosure sale; or (4) upon expiration of the redemption period. The Ninth Circuit Appellate Courts have addressed the potential to `cure' within the context of two of the four periods. In In re Metz, the court addressed cutoff option # 1 stating that the debtor has the right to cure the prepetition acceleration of a home mortgage debt triggered by default. In re Metz, 820 F.2d 1495, 1497 (9th Cir. 1987). In In re Braker, the Bankruptcy Appellate Panel addressed cutoff option # 4 stating that the debtor does not have the right to cure after a prepetition foreclosure sale. In re Braker, 125 B.R. 798, 801 (9th Cir. BAP 1991). In this appeal, we are asked to address an issue of first impression: whether the right to cure under § 1322(b)(5) is extinguished at foreclosure judgment (option # 2) or at the foreclosure sale (option #3).

After an analysis of the various legal theories applied by various courts, *Hurt* held that a debtor is allowed to cure under 11 U.S.C. § 1322(b)(5) until the time of the sale. Although not determinative of the issue in this case which concerns personal property, the comprehensive and articulate analysis contained in *Hurt* is persuasive when applied to the facts of this case.

While true as a general proposition that the commencement of a bankruptcy proceeding does not expand debtor's existing state law rights, there are numerous instances where state law rights of creditors are modified by the Code. For example, 11 U.S.C. § 506 limits a creditor's right to recover on its secured claim to the value of the collateral. This is clearly in conflict with R.C.W. 62A.9-506 which would otherwise allow the creditor to recover the full obligation owed as well as the costs of repossession, reconditioning and sale as well as attorney fees.

11 U.S.C. § 1322(b)(2) specifically states that the rights of holders of secured claims may be modified in a Chapter 13 plan. Although Bank of America asks this court to read into that section an exception for state law redemption rights, the court declines to

do so. 11 U.S.C. § 1322(b)(3) and (5) are simply other instances where the Bankruptcy Code modifies the rights otherwise held by secured creditors under state law. The Code provides that in a Chapter 13, default may be cured "within a reasonable time" regardless of the fact that the state law may give the creditor the right to accelerate or only provide for cure by payment of a lump sum. To the extent state law does not allow a cure of a default over time, which manifestly a requirement for a lump sum redemption would not, it contravenes 11 U.S.C. § 1322(b)(3) and (5). Only after a sale of the vehicle has occurred is the debtor deprived of all interest in the vehicle. Once the debtor has lost rights in the vehicle, the question of cure becomes irrelevant.

Consequently, the court finds that the debtor may pay the amount of this allowed secured claim within a reasonable time during the plan and that R.C.W. 62A.9-506 is inapplicable. The remaining issues regarding the fair market value of the vehicle and adequacy of any proposed plan payment will be determined during the confirmation process.

The Clerk of Court is directed to file this Memorandum Decision and provide copies to counsel.

DATED this 29th day of March, 2000.

PATRICIA C. WILLIAMS, Bankruptcy Judge